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CHARLES ELMORE

IN THE

Supreme Court of the United States.

October Term, 1936.

No. 28.

KVOS, INC.,

Petitioner,

vs.

THE ASSOCIATED PRESS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF RESPONDENT THE ASSOCIATED PRESS.

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KVOS, INC., Petitioner, vs. THE ASSOCIATED PRESS, Respondent.	No. 28.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF ON BEHALF OF THE ASSOCIATED PRESS.

Opinions Below.

The Associated Press v. *KVOS, Inc.*, 9 F. Supp. 279 (R. 465-493), 80 Fed. (2d) 575 (R. 556-581).

Jurisdiction.

Certiorari was granted on May 18, 1936, under Judicial Code §240(a), as amended by the Act of February 13, 1925.

Questioned Presented.

The basic question presented is whether The Associated Press, a news gathering association, is entitled to equitable protection against the piracy of its news items by a broadcasting station where the piracy is effected by taking such items upon first publication and broadcasting them before

the association and its members have had an opportunity to disseminate them by normal newspaper methods.

The question involves the following considerations:

(1) Can the case of *International News Service* v. *The Associated Press*, 248 U. S. 215, be validly distinguished from the present case by reason of the fact that the defendant in that case *(International News Service)* was a news gathering agency rather than a direct disseminator of news, while the defendant in this case (KVOS) is a direct disseminator of news by means of radio broadcasting?

(2) Assuming there is no valid distinction between the two cases, is the *International News Service* case still law?

(3) Irrespective of the *International News Service* case, is The Associated Press entitled to equitable protection against interference with its business where such interference cannot be justified either as fair competition or otherwise?

Statement of the Case.

The bill of complaint alleges that the complainant, The Associated Press, is a New York membership corporation with more than 1200 members, each owning or representing a daily newspaper in the United States; that the complainant is engaged, for the benefit of its members, in gathering news from all over the world by its own instrumentalities, by exchange with its members, and by interchange with or purchase from other news agencies; that the cost of gathering news and distributing the same to its members, amounting to many millions of dollars a year, is assessed upon its members; and that the general news gathered by complainant as well as the local news gathered by its members is by mutual agreements, set forth in the by-laws, restricted to the members for the purposes of regular publication in newspapers owned by them (R. pp. 2 to 6).

The bill further alleges that the defendant KVOS, Inc., is a corporation of the State of Washington, engaged at Bellingham, Washington, in the business of radio broadcasting for profit, the profit being derived by sale of time for advertising purposes; that during three half hour periods daily, the defendant broadcasts a so-called "Newspaper of the Air", in the course of which, interspersed with paid advertising, it systematically reads, verbatim or in slightly rearranged form, the most important and interesting items of news obtained from the latest editions of three newspapers which are published by members of the complainant The Associated Press, namely, The Bellingham Herald, the Seattle Post-Intelligencer, and The Seattle Daily Times; and that the news so "pirated" by the defendant is news gathered by the complainant and by its members within the terms of the membership agreements above mentioned.

The bill of complaint further alleges that the defendant and several members of the complainant serve much the same territory in the dissemination of such news, the territory served by defendant extending "for a radius of seventy-five to one hundred miles from the said City of Bellingham"; that the defendant and the members of the complainant disseminate news in order to increase the value of their respective mediums for advertising purposes, the defendant making its profit out of the sale of time to advertisers and the members of complainant making their profit largely out of the sale of space to advertisers; that the defendant, by pirating news so gathered by complainant and its members and broadcasting the same, makes the news known to the general public several hours in advance of the time when newspapers published by members of complainant can reach their actual or potential subscribers; that this practice of defendant is an appropriation of the product of the industry of complainant and its members and constitutes unfair competition; that it works a direct and irreparable injury to complainant and its members; and that the complainant has frequently requested the defendant to desist from the said practice, but that defend-

the association and its members have had an opportunity to disseminate them by normal newspaper methods.

The question involves the following considerations:

(1) Can the case of *International News Service* v. *The Associated Press*, 248 U. S. 215, be validly distinguished from the present case by reason of the fact that the defendant in that case *(International News Service)* was a news gathering agency rather than a direct disseminator of news, while the defendant in this case (KVOS) is a direct disseminator of news by means of radio broadcasting?

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ant has refused to desist and intends to continue the practice. The bill of complaint thereupon asks relief by temporary and permanent injunction (R. pp. 16-17).

The bill of complaint not only alleges the jurisdictional diversity of citizenship as above noted, but also alleges that the amount involved exceeds $3,000, exclusive of interest and costs (R. pp. 2, 3).

The complainant moved, by show cause order containing a temporary restraining order, for a preliminary injunction (R. pp. 37 to 40); and the portion of the Record particularly relating thereto embraces pages 18-41, 45-465. The defendant moved to dismiss the bill of complaint on the ground that it does not recite facts sufficient to entitle complainant to the relief prayed for and on other detailed grounds (R. pp. 42 to 44). The defendant's motion to dismiss was granted (with prejudice) and, as a necessary consequence, the complainant's motion for a preliminary injunction was denied by a decree and order of the District Court (R. pp. 516 to 518). The Circuit Court of Appeals reversed the District Court, reinstating the bill of complaint and directing the issuance of a preliminary injunction (R. pp. 581-582).

Summary of Argument.

I. *The bill of complaint adequately alleges that the requisite jurisdictional amount is involved.* This is in answer to petitioner's contention that such amount is not shown to be involved.

II. *The bill of complaint adequately discloses the respondent, The Associated Press, as the proper party to bring this action.* This is in answer to the petitioner's contention that the requisite diversity of citizenship is not shown since the complainant The Associated Press is not the real party in interest and the joinder of the real parties in interest would have destroyed diversity of citizenship.

III. *The bill of complaint states facts sufficient to constitute a cause of action for a permanent injunction; and the Circuit Court of Appeals properly reversed the decree of the District Court dismissing the bill.*

A. The complaint states a cause of action based on defendant's unfair competition in the advertising and news fields.

B. The complaint states a cause of action based on defendant's infringement of a property right in news.

C. The complaint states a cause of action based on defendant's interference with a lawful business without justification.

D. The defendant's interference with complainant's business is not justified by any public interest.

IV. *The preliminary injunction was rightfully granted.*

It may be remarked at the outset that we think all of the important principles involved in the present case were settled in *International News Service* v. *Associated Press,* 248 U. S. 215, and that the Circuit Court of Appeals correctly followed and applied the decision in that case.

It may further be noted that the petitioner, in its petition and brief*, repeatedly overlooks the elementary fact that its motion to dismiss is directed solely to the allegations of the complaint and is not affected by the affidavits and findings, which are to be considered only upon the motion for the preliminary injunction. We gather that the petitioner intended, in a general way, to confine its petition to the questions arising out of the motion to dismiss; however, since the argument seems to escape these seemingly intended bounds at many points, we have included a brief statement with respect to the motion for a preliminary injunction.

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*We are informed that petitioner is resting on the petition and supporting brief upon which it applied for the writ of certiorari.

POINT I.

The Bill of Complaint adequately alleges that the requisite jurisdictional amount is involved.

The complaint alleges that the amount involved in the controversy, exclusive of interest and costs, is in excess of $3,000 (R. p. 3). This allegation is controlling for the purpose of the motion to dismiss the bill.

> Opinion of District Court herein, 9 F. Supp. 279, 284; R. p. 477;
>
> Montgomery, Federal Jurisdiction & Procedure, 3 Ed. §§207, 210.

Petitioner suggests that the lack of the requisite jurisdictional amount is shown by the trifling amount of pirating disclosed in the affidavits submitted on the motion for a preliminary injunction. Insofar as this suggestion bears on that motion, we shall deal with it under Point IV. It is sufficient under the present point to note that the affidavits cannot be considered upon the motion to dismiss the bill.

Petitioner further suggests that the lack of the requisite jurisdictional amount appears upon the face of the bill since the complainant's business is shown to be of a non-profit nature. It is true that The Associated Press makes no profit. It is a membership corporation which meets its expenses by assessments upon its members. But the fact that a corporation does not make a profit does not mean that it cannot be damaged. Furthermore, as stated under the succeeding point, The Associated Press is a proper party to sue on behalf of its members; and it is apparent that the value of the right and interest of the members, properly to be protected in this action, is in excess of $3,000 as alleged in the complaint. The real interest of the respondent and its members as outlined in the complaint (R. pp. 4, 5) is unquestionably in excess of $3,000 under the principle that the jurisdic-

tional amount is to be tested, in such a case as the present, by the value of the right sought to be protected and not by the immediate pecuniary amount involved. The respondent seeks to protect news in the collection of which it expends many millions of dollars (R. p. 4).

Opinion of C. C. A. herein, 80 F. (2) 575, 579; R. pp. 563-565;

Montgomery, Federal Jurisdiction & Procedure, §208 (and cases cited);

Bitterman v. *Louisville & N. R. R.*, 207 U. S. 205, 225;

Local No. 7 of Bricklayers Union v. *Bowen*, 278 F. 271;

Herbert v. *Rainey*, 54 F. 248;

King v. *Kansas City Police Relief Association*, 60 F. (2d) 547.

It is further to be noted that the non-profit nature of the respondent's business was set forth in *International News Service* v. *Associated Press*, 248 U. S. 215, in substantially the same terms as in the present case; and this Court nevertheless assumed without question that the requisite jurisdictional amount was there involved.

POINT II.

The Bill of Complaint adequately discloses the respondent, The Associated Press, as the proper party to bring this action.

The petitioner argues that The Associated Press is not the real party in interest and that a joinder of the real parties in interest would destroy the requisite diversity of citizenship.

The petitioner bases this argument primarily on the theory that The Associated Press cannot have an interest in the controversy since it operates without profit, merely assessing the cost of its operations upon its members. In view of the

structure of The Associated Press and its relationship to its members, we think a court of equity will recognize that, whether or not the corporation is itself a business concern, it is operated and maintained by its members as an auxiliary business enterprise. Under its by-laws all news furnished to members or gathered by members belongs to The Associated Press. It is designed to maintain a trained and efficient organization for the gathering of news and, to this end, to derive the necessary income to employ and adequately remunerate a staff of experts. For all practical purposes it is in obvious and keen competition with other news gathering agencies as was recognized by the Supreme Court in the *International News Service* case (248 U. S. 215). In that case the record showed The Associated Press's method of operation precisely as alleged in the present bill of complaint. Its members are its customers, and there would be no point in collecting profits from them in order to return the profits as dividends.

Quite aside from the respondent's interest as a business concern, the respondent is a proper party to sue on behalf of the various newspaper members. When the question is one of common or general interest to many persons constituting a class, one or more may sue for the whole (Fed. Eq. Rule No. 38, Hopkins 6 ed., p. 226). It is well settled that classes of persons similarly situated may be represented by an association or organization such as the respondent herein (*Merchants Association* v. *United States,* 231 Fed. 292; Foster's Fed. Pr., 6 ed., sec. 114). In the *International News Service* case this Court expressly held that the "complainant is a proper party to conduct the suit as representing their (the members') interest * * *" (248 U. S. 215, 233).

The petitioner argues, however, that the present case involves no general interest on the part of similarly situated parties, but concerns only one or at the most three newspapers (Petition, pp. 8, 17); and that these papers are necessary parties if not the only proper parties complainant. While they might have been proper parties they are not necessary parties since the case does not deal with any right or damage which is limited to the three newspapers. The

complaint alleges that numerous other members of respondent within the territory in question are injured (R. p. 13). Furthermore, in showing the general operation and structure of The Associated Press, the complaint clearly shows that its more than 1200 members (R. p. 4) are interested in the protection of The Associated Press as their mutual agency for the competitive collection and distribution of news. As heretofore pointed out, the news gathered by the individual members belongs, for the purposes of general dissemination, to the association. The petitioner persistently ignores this fact in its attempt to picture the controversy as a local one between the Bellingham Herald and itself.

Both the District Court and the Circuit Court of Appeals held that there was no defect of parties complainant in this case.

> Opinion of District Court, 9 F. Supp, 279, 284; R. p. 478;
> Opinion of C. C. A., 80 Fed. (2d) 575, 579-580; R. pp. 566-568.

As pointed out in the latter opinion, the question here under consideration has been decided adversely to the petitioner in the *International News Service* case (248 U. S. 215).

POINT III.

The Bill of Complaint states facts sufficient to constitute a cause of action for a permanent injunction; and the Circuit Court of Appeals properly reversed the decree of the District Court dismissing the bill.

No distinction of importance can be drawn between the present case and *International News Service* v. *The Associated Press*, 248 U. S. 215. The petitioner attempts to meet the *International News Service* case partly by dwelling on

various differences, of no importance in principle, between newspapers and broadcasts, partly by stubborn adherence to the dissenting views rejected in the prevailing opinion of this Court, and partly by a repetitious misstatement of the holding of the majority of this Court. Furthermore, while we cannot find that petitioner has anywhere stated what this Court did hold, we gather that it does not agree with the holding.

In the present case, the allegation is that defendant petitioner pirates The Associated Press news by taking the same from newspapers, published by members of The Associated Press, after publication but before distribution in ordinary course, and by disseminating the same by radio broadcasts. The petitioner repeatedly asserts that, accordingly, it obtained the news rightfully; and that this fact distinguishes the present case from *International News Service* case in which, petitioner repeatedly asserts, the news was obtained wrongfully, namely, by bribery and like methods. The simplest way to dispose of this misstatement is to quote from the opinion of this Court (248 U. S. 215, 231):

> "The bill was filed to restrain the pirating of complainant's news by defendant in three ways: First, by bribing employees of newspapers published by complainant's members to furnish Associated Press news to defendant before publication, for transmission by telegraph and telephone to defendant's clients for publication by them; Second, by inducing Associated Press members to violate its by-laws and permit defendant to obtain news before publication; and Third, by copying news from bulletin boards and from early editions of complainant's newspapers and selling this, either bodily or after rewriting it, to defendant's customers."

After pointing out that the matters arising under the first and second heads (bribery and inducing violations of by-laws) had been disposed of in the courts below (by the granting of a preliminary injunction) this Court said (p. 232):

> "The only matter that has been argued before us is whether defendant may lawfully be restrained from ap-

> propriating *news taken from bulletins issued by complainant or any of its members, or from newspapers published by them,* for the purpose of selling it to defendant's clients. * * * As presented in argument, these questions are: 1. Whether there is any property in news; 2. Whether, if there be property in news collected for the purpose of being published, it survives the instant of its publication in the first newspaper to which it is communicated by the news-gatherer; and 3. Whether defendant's admitted course of conduct in appropriating for commercial use matter taken from bulletins or early editions of Associated Press publications constitutes unfair competition in trade." (Italics ours.)

It was upon these questions that this Court affirmed the order of the Circuit Court of Appeals granting a preliminary injunction under the third head (the taking of news from bulletins and published papers). Thus, there was no distinction whatever, in the manner of obtaining news, between the *International News Service* case (so far as this Court was called upon to decide) and the present case. In each case the news was obtained rightfully. In each case the point is that the defendant *wrongfully used* the news although *rightfully obtained.*

A. The Complaint States a Cause of Action Based on Defendant's Unfair Competition in the Advertising and News Fields.

For the purposes of a motion to dismiss, the allegations of the bill must of course be taken as true. The petitioner, without any regard to whether its argument is addressed to the motion to dismiss or to the motion for a preliminary injunction, volunteers the statement that the petitioner's station is a small 100-Watt station with a sending radius of only five miles (Petition, p. 1, and elsewhere); that on this account it could not compete with any of the member newspapers of The Associated Press, except the Bellingham Herald, and that even the Circuit Court of Appeals found that the news items taken from this paper were "but twelve in number over the course of a year" (Petition, p. 17).

As will later appear, these volunteered statements have no foundation in the record, even as applied to the motion for a preliminary injunction. Much less can they be considered upon the motion to dismiss. The allegation of the complaint is that the territory served by the petitioner's station extends for a radius of 75 to 100 miles from the City of Bellingham, and that numerous member newspapers of The Associated Press, including the three specifically mentioned in the complaint, serve the same territory to a greater or lesser extent (R. p. 13).

Regarding The Associated Press and its member newspapers as identical so far as the right to injunctive relief is concerned, the allegations of the complaint show that it and the defendant are engaged in competition in the advertising field. The complainant's members and the defendant each sell advertising facilities to advertisers, the complainant's members selling space in their advertising mediums, while the defendant sells time on its advertising medium. In the case of each business, the advertising medium obtains a substantial part of its advertisement-carrying power from news. In the conduct of its advertising business, the defendant appropriates or pirates and broadcasts news gathered by the complainant and its members, and thereby impairs the carrying power of the advertising mediums of the complainant's members.

The District Court held (R. pp. 484 to 485) that no competition exists between newspaper publishers and broadcasting stations, because the newspaper publisher sells his paper to the public at a nominal price while the broadcaster charges the public nothing. We think this position overlooked the plain facts of the case, and proceeded upon an unduly narrow interpretation of the word "competition." In reversing the District Court, the Circuit Court of Appeals effectively disposed of the position thus taken by the lower Court (80 F. (2d) 575, 581-582; R. pp. 571-574).

It is a well recognized fact, and it is alleged in the bill (R. p. 9), that newspapers derive the larger part of their revenue from advertising rather than from the sale of their

papers to the public. A large circulation is essential in order to attract advertisers; and, in order to obtain a large circulation, attractive and complete news reports are vital (R. p. 9).

In the same way, in the radio field, the broadcaster receives his revenue from the sale of advertising time or sponsored programs; and in order to attract advertisers it is essential to have a large listening audience. It is a matter of public knowledge that the broadcaster, in addition to the sponsored programs for which he is paid, often broadcasts, without allocated charge, some feature (whether news or otherwise) which he thinks will appeal to the public and thus increase the popularity of the station (R. pp. 8, 9).

Thus the newspaper publisher and the broadcaster are in direct commercial competition with each other in their endeavor to attract and retain paid advertising by widening the circle of those whom they reach.

It is merely viewing the situation from another angle to say that The Associated Press members and the petitioner are likewise competing in the business of disseminating news. In each case the dissemination of news is an integral part of the business of the respective parties, whether the newspaper or the broadcasting business. The newspaper disseminates news as part of a commercial enterprise; and obtains a return by charging its advertisers. In the conduct of its news disseminating business the defendant appropriates or pirates and broadcasts news gathered by the complainant and its members and thereby competes unfairly and directly with the complainant members.

In *Associated Press* v. *Sioux Falls Broadcast Association* (U. S. D. C. for Dist. of S. D. March 14, 1933, Elliott, District Judge) the facts were on all fours with those of the present case and the Court there granted such relief as is sought herein.*

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* No opinion was rendered in the *Sioux Falls* case nor is the case reported, but copies of the findings and conclusions were submitted to both lower courts herein on argument. A similar case, likewise unreported, is *New Orleans Times Picayune, et al.* v. *Uhalt* (N. Y. Times, June 30, 1933) in which plaintiffs were granted a twenty-four hour injunction against use of news from their newspapers for defendant's broadcasting purposes.

In *International News Service* v. *Associated Press* (248 U. S. 215), The Associated Press was granted an injunction similar to that sought in the present case. As heretofore stated we think that case is not distinguishable in principle from the present case. There as here the complainant was The Associated Press. Its status as a membership corporation and its relation to its members were set forth as in the present case. The defendant International News Service was likewise engaged in the gathering of news and the distribution thereof to newspapers; but the International News Service was not a membership corporation, and operated for a profit on its own account by charging its subscribers for its service and not by assessing members as did The Associated Press. The case involved the piracy of news by the taking of news items from papers of Associated Press members upon first publication and by the commercial distribution of such items.

On the question of unfair competition this Court there said (248 U. S. 215, 240-241):

> "The contention that the news is abandoned to the public for all purposes when published in the first newspaper is untenable. Abandonment is a question of intent, and the entire organization of the Associated Press negatives such a purpose. The cost of the service would be prohibitive if the reward were to be so limited. * * * Their effect (complainant's by-laws) is that publication by each member must be deemed not by any means an abandonment of the news to the world for any and all purposes, but a publication for limited purposes; for the benefit of the readers of the bulletin or the newspaper as such; not for the purpose of making merchandise of it as news, with the result of depriving complainant's other members of their reasonable opportunity to obtain just returns for their expenditures."

Referring to the news, this Court said (p. 240):

> "* * * It has all the attributes of property necessary for determining that a misappropriation of it by a com-

petitor is unfair competition because contrary to good conscience."

We think it is apparent that the advertising and news disseminating phases of the respective businesses (newspaper and broadcasting) cannot be divorced, that the defendant broadcasts news for profit, even though it obtains its return indirectly from advertisers, and that accordingly the complainant's members and defendant are competing commercially in the dissemination of news. As a statement of fact, we think the foregoing is too obvious for argument. Insofar as legal questions are involved, the following cases support the proposition that petitioner was operating for a profit in its news broadcasts even though it collected from others than the listeners.

Herbert v. *Shanley Co.* (1917), 242 U. S. 591;
Buck v. *Jewell-LaSalle Realty Co.*, 283 U. S. 191;
Remick v. *American Automobile Accessories Co.*, 5 F. (2d) 411 (Cert. denied 269 U. S. 556);
Remick v. *Bamberger & Co.*, 291 F. 776;
Dreamland Ballroom, Inc. v. *Shapiro, Bernstein Co.*, 36 F. (2d) 354 (citing cases);
Notes, 40 A. L. R. 1513; 66 A. L. R. 1366;
Sarpy v. *Holland* (1908), 2 Ch. 198.

In the *Shanley* case, this Court held that the defendant, in employing an orchestra to render a musical composition in its restaurant without any specific charge to the customers for the music, was performing the composition "for profit" within the meaning of the copyright statute. This Court said (pp. 594, 595):

> "The defendants' performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order, is not important * * * If music did not pay it would be given up. If it pays it pays out of the public

pocket. Whether it pays or not the purpose of employing it is profit and that is enough."

Needless to say, the petitioner misconceives the applicability of this case in distinguishing it as a copyright case (Brief, pp. 30-31). It is cited merely as showing by analogy that petitioner's news broadcasts are an integral part of their commercial enterprise and, in the sense here pertinent, cannot be regarded as gratuitous. Upon the principle of the *Shanley* and other like cases above cited, we think it is clear that the petitioner is in competition with The Associated Press and its members, even though the petitioner finds itself unable to make any charge directly against its listeners. The Circuit Court of Appeals so held, and we think its decision is unassailable.

The petitioner assumes (incorrectly, as pointed out under subhead C, infra) that the complaint cannot be upheld unless it makes out a case of actual competition. To this assumption, the petitioner adds the further assumption that the competition must be substantial in the sense and degree pertinent in cases arising under the Federal Trade Commission and the Clayton Acts.

We have already referred to the fact that the petitioner asserts, utterly without foundation, that its station is effective only within a radius of five miles; and to the fact that the complaint states the radius as from seventy-five to one hundred miles.

The petitioner expands its general effort to minimize the competition by arguing (Petition, pp. 13, 14, 16) that it consumes only ten percent of its time in news broadcasts; and thereupon attempts to draw an analogy from Federal Trade Commission and Clayton Act cases. Petitioner overlooks the distinction between the general law of unfair competition as between individuals and the statutory law in the public interest under which the Commission acts—a distinction which the courts have repeatedly emphasized.

15 U. S. C. A. section 45, and notes, particularly page 262;

Schechter Poultry Corp. v. *United States,* 295 U. S. 495;

Raladam Co. v. *Federal Trade Commission,* 283 U. S. 643 (affirming 42 F. (2d) 430, q. v. at p. 436).

In *International Shoe Company* v. *Federal Trade Commission* (280 U. S. 291) (Petition pp. 9, 16) the question arose under the Clayton Act as to whether the Shoe Company's acquisition of the stock of another Company was such as "to substantially lessen competition" within the prohibition of that act. The percentage of competition relevant under that Act has nothing to do with the question of private rights involved in the present case.

In a case of unfair competition, the extent of defendant's business has no bearing. Thus complainants' right to enjoin infringment of their trade-names is unaffected by the amount of business done by defendant. (*Garcia* v. *Garcia,* D. C. Wisconsin, 197 F. 637 at 641).

B. The Compaint States a Cause of Action Based on Defendant's Infringement of a Property Right in News.

The petitioner repeatedly states in substance that this Court, in the *International News Service* case, *supra,* held that neither The Associated Press nor any of its members had any property right in news reports after the instant of their first publication. The assertion would seem to be specifically controverted by the language of this Court. As between the parties engaged in the commercial use of fresh news, this Court stated that news as news "must be regarded as quasi property, irrespective of the rights of either as against the public" (pp. 236-237). Again this Court refers to news as "salable material" and, as such, susceptible of mis-appropriation (p. 239). Again, referring to news, this Court says (p. 240):

> "But in a court of equity, where the question is one of unfair competition, if that which complainant has ac-

quired fairly at substantial cost may be sold fairly at substantial profit, a competitor who is misappropriating it for the purpose of disposing of it to his own profit and to the disadvantage of complainant cannot be heard to say that it is too fugitive or evanescent to be regarded as property. It has all the attributes of property necessary for determining that a misappropriation of it by a competitor is unfair competition because contrary to good conscience."

In view of this language, it is scarcely necessary to deal with petitioner's volatile argument that "in order to sustain the Circuit Court's decision this Court is called upon to affirm a general and absolute property right in published and distributed news, as such" (Brief, p. 21).

The substantial identity of the question involved in the *International News Service* case, perhaps renders it superfluous to go further afield for analogies. There is, however, a long line of cases in which the courts have held that the gatherer and distributor of specialized items of news, when gathered for limited distribution to subscribers who desire the service for commercial use, has such a property right in the gathered items (as long as they are commercially live news) as to afford a basis for equitable protection against a defendant who utilizes the items not for the purposes for which they are distributed by the plaintiff, but for the purpose of commercial retransmission to such subscribers or purchasers as the defendant obtains as his own customers. It is deemed sufficient to cite three of these cases, namely, *Board of Trade* v. *Christie Grain & Stock Company*, 198 U. S. 236, *Hunt* v. *N. Y. Cotton Exchange*, 205 U. S. 322 and *National Telegraph News Company* v. *Western Union Telegraph Company*, 119 Fed. 294. The *Christie* and *Hunt* cases involved stock quotations transmitted by ticker; and the *Western Union* case involved miscellaneous news items also transmitted by ticker. In each action the defendant contended that the dissemination of the information by ticker was a publication to the world or a "dedication" to the public; but the plaintiff was held entitled to an injunction against the defendant's use of such items for commercial retransmission and as long as the items constituted live news.

The District Court in the present case distinguished such cases on the ground that there was a use of the items by the respective defendants in violation of contract or by way of inducing a breach of trust on the part of some receiver of such items (R., p. 487). But this same distinction was made by Mr. Justice Brandeis in his dissenting opinion in the *International News Service* case (248 U. S. 215, 251-252); although he recognized that the language of the cases went further. The majority of this Court refused to accord these cases such a limited significance, however, and cited the *Christie* and *Western Union* cases, *supra*, for the general proposition that the service of purveying such news was a business "partaking of the nature of property in a sense that entitled" the purveyor "to the protection of a court of equity against piracy" (p. 238).

That equity recognizes various intangible rights as qualified property rights is illustrated in *Fisher* v. *Star Company*, 231 N. Y. 414. This was an action by the creator of the Mutt and Jeff cartoon characters to enjoin the publication of imitative cartoons which used Mutt and Jeff as their subjects, although without actual copying of the plaintiff's cartoons. In granting an injunction the Court said (p. 428):

> "Any civil right not unlawful in itself nor against public policy, that has acquired a pecuniary value, becomes a property right that is entitled to protection as such. The Courts have frequently exercised this right. They have never refused to do so when the facts show that the failure to exercise equitable jurisdiction would permit unfair competition in trade or in any matter pertaining to a property right" (citing the *International News Service* case, *supra*).

The Court granted the injunction to the plaintiff "as the owner of the property right existing in the characters represented in such figures and names" (p. 432).

It is perhaps desirable to comment briefly on several other cases cited by petitioner as holding that news, as such, is not subject to protection.

While "news", as such, is not subject to copyright, its "piracy" from the gatherer will be enjoined until its dissem-

ination by the gatherer and until its commercial value as live news is gone. *Davies* v. *Bowes* (209 F. 53) cited by petitioner (Brief, p. 53) involved only a question of whether a piece of fiction, printed in a newspaper as news and copyrighted, was entitled to copyright protection against the use of the story in a drama, long after the publication. The Court held there was no copyright since the fiction was printed and offered to the public as news.

Tribune Company v. *A. P.* (116 F. 126) cited by petitioner (Brief, pp. 56, 57, 58) is purely a copyright case and was so decided (and the case was urged before the Supreme Court in the *International News Service* case, 248 U. S. at pp. 217, 219). The first publication would of course terminate the common law copyright, but the Supreme Court in the *International News Service* case emphatically states that the question before it was not a copyright question but a question of the right to protection during the very process of dissemination, which necessarily continued for some hours after the first technical publication. In the *Tribune* case no question of unfair competition or unjustified interference with another business was presented. Incidentally, the petitioner is mistaken in saying the defendant therein was the present complainant. The present complainant had not been organized at that time.

Atlantic Monthly Publishing Co. v. *Post Publishing Co.* (27 F. (2d) 556) cited by petitioner (Brief, p. 61) held that the plaintiff was not entitled to an injunction since its right in an article by Alfred E. Smith had already terminated, *by the terms of the agreement with the plaintiff.*

Dodge Corporation v. *Comstock,* 251 N. Y. S. 172, cited by petitioner (Brief, p. 60) is a case of the misappropriation of confidential news. The quotation by petitioner is a dictum and is from the dissenting opinion in the *International News Service* case when in the Circuit Court of Appeals (245 F. 244, 253).

Assuming that there is a quasi property in live news during the period of its normal dissemination, as held by this Court in the *International News Service* case, it is apparent.

that the petitioner in the present case, under the allegations of the complaint, is guilty of a misappropriation of such property.

C. The Complaint States a Cause of Action Based on Defendant's Interference With a Lawful Business Without Justification.

We think the two preceding subheads establish complainant's right to injunctive relief, first, because the defendant is unfairly competing in the advertising and news fields, and, second, because defendant is infringing on what equity regards as a property right in news as between the parties. In view of the considerable discussion and argument which has arisen in the case with respect to the precise definition of competition and the precise boundaries of the property right in news after first publication, we think it is pertinent, although perhaps superfluous, to point out that the complainant's right to injunctive relief rests on a broader ground than unfair competition or a specific property right in news reports.

The basic right of complainant and its members is the right to carry on a lawful business without interference; and this right has consistently been held to be a property right such as to afford a basis for equity jurisdiction. The interference is not actionable if it is merely a consequence of defendant's proper exercise of his own rights; in other words, the interference must be without justification. But the defendant is bound to act in accordance with the maxim *sic utere tuo ut alienum non laedas* (as stated by this Court in the *International News Service* case at p. 241). The most frequent justification for interference with another's business is competition—and competition is of course a *prima facie* justification since favored by public policy. But competition is not a justification if it is unfair. This is the origin and the sustaining principle of the law of unfair competition.

Accordingly, the plaintiff's right to relief depends, first, on interference with its business, and, second, on lack of

justification therefor on the part of the defendant. There is no dispute about the fact of interference with and damage to the business of complainant and its members. For the purposes of the motion to dismiss, the allegations of such interference and damage must be taken as true. As far as the fact of interference with and damage to complainant's business is concerned, the present case is indistinguishable from the *International News Service* case, *supra*.

It follows that the matter of competition is relevant only in so far as it affects the defendant's justification for pirating complainant's news reports. Competition constitutes a *prima facie* justification, and renders it necessary for the complainant to show that the competition is unfair. As heretofore indicated, we think the defendant clearly has the *prima facie* justification of competition, but that this justification is defeated with equal clearness by the unfairness of the competition. Even if it could be maintained that defendant was not competing with the complainant since it charged nothing to its listeners, this would have no effect except to deprive the defendant even of its *prima facie* justification, and would therefore put the defendant under the necessity of showing some other justification. Such a justification is in fact suggested in the claim that defendant is performing a public service; but before dealing with this alleged justification, we shall briefly refer to the authorities showing that the law of unfair competition is simply a phase of the broader law of unfair or unjustifiable interference with a lawful business.

Much of the early discussion of the subject of unjustified interference with a lawful business centered about the case of *Keeble* v. *Hickeringill* (1707), 11 East 574, note. The plaintiff conducted a business in wild fowl, using for the purpose a decoy pond which he owned. The defendant, intending to injure the plaintiff and deprive him of his profit, used to resort to a position on his own land close to the plaintiff's decoy pond and there shoot off a gun "whereby the wild fowl were frighted away and did forsake the said pond." In allowing the plaintiff to recover in an action on

the case, the Court based its decision on the broad ground that "he that hinders another in his trade or livelihood is liable to an action for so hindering him." The Court recognized that *fair* competition would have afforded the defendant a justification as indicated by the following quotation:

> "But if a man doth him damage by using the same employment, as if Mr. Hickeringill had set up another decoy on his own ground near the plaintiff's and that had spoiled the custom of the plaintiff, no action would lie, because he had as much liberty to make and use a decoy as the plaintiff."

The *Keeble* case evoked a prolonged discussion as to whether and how far a malicious injury to, or interference with, another's business would cause an act otherwise legal to become illegal. Thus, the subject was discussed at great length in the celebrated case of *Allen* v. *Flood,* App. Cas. 1 (1898). An echo of the discussion appears in the dissenting opinion of Mr. Justice Brandeis in the *International News Service* case, *supra,* in which he argues that the actionable unfairness in unfair competition "involves either fraud or force or the doing of acts otherwise prohibited by law," or, in cases of simulated competition, the "deliberate and wanton destruction of plaintiff's business" (p. 258).

The prevailing opinion in the *International News Service* case, however, gave a broader scope to the doctrine of the *Keeble* case (not cited by the Court). Referring to the business of making news known to the world, this Court said in the *International News Service* case, *supra:*

> "The parties are competitors in this field; and, on fundamental principles, applicable here as elsewhere, when the rights or privileges of the one are liable to conflict with those of the other, each party is under a duty so to conduct its own business as not unnecessarily or unfairly to injure that of the other. *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229, 254" (pp. 235-236).
>
> "* * * The right to acquire property by honest labor or the conduct of a lawful business is as much entitled to

> protection as the right to guard property already acquired * * * It is this right that furnishes the basis of the jurisdiction in the ordinary case of unfair competition" (pp. 236-237).
>
> "Stripped of all disguises, the process (of defendant in pirating news) amounts to an unauthorized interference with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not * * *" (p. 240).

This Court further emphasized the breadth of the ground on which its decision rested by its citation of the *Hitchman* case, *supra,* in which the defendant labor union appropriated no profits of the plaintiff but was enjoined from inducing the plaintiff's employees to join the union contrary to their agreement with the plaintiff. Again, in commenting on the principle that "palming off" is not essential to give a right of action, this Court said (pp. 241-242):

> "But we cannot concede that the right to equitable relief is confined to that class of cases. In the present case the fraud upon complainant's right is more direct and obvious * * * Instead of selling its own goods as those of complainant, it substitutes misappropriation in the place of misrepresentation and sells complainant's goods as its own.
>
> "Besides the misappropriation, there are elements of imitation, of false pretense, in defendant's practices * * * but these elements, although accentuating the wrong, are not the essence of it."

There are a great variety of cases holding that an unjustified or unfair interference with or injury to a lawful business is actionable, despite the absence of such conventional features as "passing off" and competition. The cases are too numerous and too uniform to call for exhaustive citation. We think it may be useful, however, to group a few of the typical cases.

(a) In the following cases of unfair interference with a lawful business, the unfairness consisted in the appropriation of a business system or the like, although there was no "passing off": *Fonotipia, Ltd.* v. *Bradley,* 171 F. 951; *Meyer* v. *Hurwitz,* 5 F. (2d) 370 (App. Dis. 10 F. 2d 1019); *Prest-O-Lite Co.* v. *Davis,* 209 F. 917, aff'd 215 F. 349; *National Telephone Directory Co.* v. *Dawson Manufacturing Co.,* 214 Mo. App. 683 (263 S. W. 483).

In the *Fonotipia* case, the defendant reproduced records from phonographic matrices of the plaintiff, thereby saving the expense of royalties to artists, etc.; the court upheld plaintiff's right to injunctive relief on the ground that the defendant's acts constituted an appropriation of the plaintiff's property as distinguished from strict competition. The matrices were not secured by any breach of trust as was the news information in some of the ticker cases.

In the *Hurwitz* case, the plaintiff had a system of selling coin-operated vending machines for postcards which he specially designed to fit the machine and which he sold exclusively to purchasers of such machines. The defendant made postcards to fit plaintiff's machines and solicited the trade of plaintiff's machine owners. The court granted a preliminary injunction on the ground that the defendant was unfairly appropriating or encroaching on the plaintiff's business system, although he did not pass off his postcards as being of the plaintiff's make.

In the *Prest-O-Lite* case, the defendant was selling gas, not by passing off his goods as plaintiff's, but by obtaining and using plaintiff's convenient exchangeable tanks as a method of taking over plaintiff's customers. The court upheld plaintiff's right to an injunction on the ground that, irrespective of palming off or competition, the defendant was in fact appropriating the plaintiff's gas exchange system, which was a part of the plaintiff's business property.

In the *National Telephone Directory Company* case, the defendants were preparing to place false covers on the telephone directories (which the plaintiff printed and in which

the plaintiff had the right to sell advertising space) and to sell advertising space on such false covers. In holding that the petition stated a cause of action for an injunction, the court remarked that the defendants' scheme was "more than unfair competition; it amounts to an actual appropriation of the plaintiff's property by the defendants to their own business purposes". The plaintiff was held entitled to an injunction regardless of any passing off of defendants' goods as the goods of the plaintiff.

The present petitioner (Brief, pp. 18-19) and the District Court (R. p. 488) have interpreted the case of *Cheney Brothers* v. *Doris Silk Corporation,* 35 F. (2d) 279, cert. den. 281 U. S. 728, as limiting the scope of the *International News Service* case. In that case the court refused to grant an injunction under circumstances which the present petitioner purports to find similar to those in the present case, but which are obviously radically different. The plaintiff there obtained annually at considerable cost a large number of silk patterns for the ensuing season. The defendant copied such patterns as proved to be popular and sold them without any passing off. The defendant asked an injunction against such copying of its patterns to apply for the duration of the season. The Court refused to extend the doctrine of the *International News Service* case to the case before it. The patterns in question were concededly not such as could be protected by copyright. We think the protection of silk patterns from copying or near-copying presents practical difficulties of an obvious nature which do not exist with respect to the protection of live news. Furthermore, while it might fairly be said that a substantial extension of the *International News Service* case would be necessary in order to cover the *Cheney Bros.* case, no real extension is necessary to cover the present case.

Petitioner refers to *Reichelderfer* v. *Quinn,* 287 U. S. 315, as confirming the limitation upon the scope of the *International News Service* case (Petition, pp. 18, 19). But the *Quinn* case merely held that adjoining owners acquired no

right to have Rock Creek Park in Washington remain a park. This Court said (p. 319):

> "Beyond the traditional boundaries under common law only some imperative justification in policy will lead the courts to recognize in old values new property rights. Cf. International News Service vs. Associated Press, 248 U. S. 215 with Cheney Bros. vs. Doris Silk Corporation 35 F. (2d) 279."

That this Court has not repudiated or limited the doctrine of the *International News Service* case is apparent from the *Schechter* case (295 U. S. 495, 531-2) in which this Court, in discussing the meaning of "Codes of Fair Competition", pointed out that the doctrine of unfair competition is not confined to cases of "palming off", but applies to "misappropriation as well as misrepresentation, to the selling of another's goods as one's own—to misappropriation of what equitably belongs to a competitor", citing the *International News Service* case.

(b) In the following cases of unfair interference with a lawful business, the unfairness consisted in an encroachment upon the plaintiff's good name or good will although there was no competition: *Peninsular Chemical Co.* v. *Levinson,* 247 Fed. 658 (C. C. A. 6); *American Products Co.* v. *American Products Co.,* 42 Fed. (2d) 488; *Vogue Company* v. *Thompson-Hudson Co.,* 300 Fed. 509 (C. C. A. 6); *Wisconsin Electric Co.* v. *Dumore,* 35 Fed. (2d) 555 (Cert. denied 282 U. S. 218); *Wall* vs. *Rolls-Royce of America,* 4 Fed. (2d) 333; *Fox Company* v. *Glynn,* 191 Mass. 344, 78 N. E. 89.

In the *Levinson* case, the plaintiff conducted a drug store, using the name "Penslar"; the defendant sold "Penslar" cigars and asserted a justification on the ground that the plaintiff did not sell cigars. In upholding an injunction, the court held that the purpose and effect of defendant's activity were to encroach upon the plaintiff's good name and goodwill, and stated (p. 661):

> "* * * We know of no principle which will forbid malicious destruction of this kind to a competitor and permit it to a stranger."

In the *American Products Company* case, the plaintiff's name had acquired a secondary meaning in connection with its business of non-carbonated beverages. The defendant used the same name but sold only carbonated beverages. The court regarded it as settled law that "actual market competition is not an essential element of what has come to be known as 'unfair competition'" (citing cases), and enjoined the defendant on the ground that it was encroaching upon the plaintiff's goodwill.

In the *Vogue Company* case, the plaintiff in connection with its style magazine used the letter "V" in "Vogue" with the picture of a girl in the "V." The defendant sold hats bearing the label "Vogue" also with a picture of a girl in the "V." The defendant thus gave the impression that his hats were in some way sponsored by the plaintiff; but there was no competition. In enjoining the defendant, the court said (p. 512):

> "But there is no fetish in the word 'competition.' The invocation of equity rests more vitally on the unfairness."

In the *Dumore* case, the plaintiff used the name "Dumore" on its products which did not include washing machines; the defendant applied the name to washing machines only; and the plaintiff's right to an injunction was upheld on the ground that the defendant was encroaching on the plaintiff's goodwill.

In the *Wall* case, the court, at the instance of a manufacturer of motor cars, enjoined a radio tube maker from using the name "Rolls-Royce Tube Company", holding that there was "an unfair attempt to appropriate the plaintiff's goodwill and fair name" and that this fact was not affected by the absence of competition between the parties.

In the *Glynn* case, the defendant wholesaler sold bread imitating plaintiff's product, and justified the practice on the

ground that he did not deceive the retailers to whom he sold. In upholding the plaintiff's right to an injunction the court said:

> "Such a fraud need not be an active fraud, in any other sense than in the willful refusal to recognize the right of the party, who has acquired a reputation for his goods, to have the benefit of the confidence which he has earned."

(c) In *Walter Baker & Company* v. *Sanders*, 80 Fed. 889, a case of unfair interference with a lawful business, the unfairness consisted in the sale of imitative goods by a defendant who was acting as an agent for another party and did not himself obtain the profit of which the plaintiff was deprived, but this was held to be no ground for refusing an injunction (see Nims on Unfair Competition, Third Edition, p. 973).

In *Borden's Ice Cream Co.* v. *Borden's Condensed Milk Co.*, 201 F. 510, cited in this connection by petitioner (Petition, p. 16), there was no competition since one party was selling ice cream (or about to sell ice cream) and the other milk; and the only question remaining, therefore, was whether the defendant was injuring the plaintiff by use of the name "Borden" in a non-competitive business. That such an injury may be actionable has been re[illegible]edly held.

(d) In the following cases of unfair int[illegible]nce with a lawful business, the unfairness consisted in labor activities such as picketing and boycotting, which lacked the justification of reasonable advancement of the defendant's own interests; and in these cases there was, of course, no competition, no passing off, and no appropriation of profits: *Steinert and Sons* v. *Tagen*, 207 Mass. 394 (93 N. E. 584); *American Foundries* v. *Tri-City Council*, 257 U. S. 184; *Casey* v. *Cincinnati Typographical Union*, 45 Fed. 135; *Gray* v. *Building Trades Council*, 91 Minn. 171 (97 N. W. 663).

(e) In the following cases of unfair interference with a lawful business, the unfairness consisted in libelous state-

ments affecting the plaintiff's business: *Dehydro Inc.* v. *Tretolite Co.*, 53 Fed. (2d) 273; *Farquhar Co.* v. *National Harrow Co.*, 102 Fed. 714 (C. C. A.).

(f) In *Davis* v. *New England Railway Publishing Co.*, 203 Mass. 470 (89 N. E. 565), another case of unfair interference with a lawful business, the unfairness consisted in the wilful exclusion of plaintiff's name from a trade directory of reputable express companies. On demurrer, the Court held that the plaintiff was entitled to equitable relief on the ground that the exclusion of plaintiff's name constituted an unjustifiable injury to plaintiff's business. Obviously the defendant was not competing with the plaintiff, and, so far as appeared, he derived no profit from the exclusion of plaintiff's name.

(g) In the following cases of unfair interference with a lawful business, the unfairness consisted in the fact that the defendant's acts, although such as would be justifiable if they constituted genuine competition, were in fact unjustifiable because they constituted a merely simulated competition, the real purpose of which was to injure or destroy plaintiff's business: *Tuttle* v. *Buck*, 107 Minn. 145 (119 N. W. 946); *Dunshee* v. *Standard Oil Co.*, 152 Iowa 618 (132 N. W. 371), affd. 165 Iowa 625; *Boggs* v. *Duncan-Schell Furniture Co.*, 163 Iowa 106 (143 N. W. 482).

A large number of cases involving unfair interference with lawful business are collected in Chapters 12 and 19 of Nims on Unfair Competition, Third Edition, the latter chapter being cited in the *Schechter* case, *supra*. The general question of interference with business as a cause of action, and the extent to which the defendant's furtherance of his own interests is a justification, were considered at length in *Mogul Steamship Co.* v. *McGregor*, 23 Q. B. D. 598, in which the Court said (p. 613):

> "Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact damage another in that person's property or trade, is actionable if done without just cause or excuse."

and see *Parkinson Co.* v. *Trades Council*, 154 Cal. 581 (98 Pac. 1027), and *Huskie* v. *Griffin*, 75 N. H. 345 (74 Atl. 595).

We think it is manifest that the doctrine of the foregoing cases demonstrates the right of the present complainant to injunctive relief. Regarded from the standpoint of unfair interference with complainant's business, it is obvious, in the first place, that there is an interference with plaintiff's business by the defendant. This is not a case where the *fact* of interference can be disputed by showing that defendant is not competing, is not "passing off", is not misleading the public or is deriving no profit. From an objective standpoint, the factual interference remains the same whether the defendant's activities are to be described as an appropriation, competition, or pure beneficence. Furthermore, the factual interference is of the same nature as the interference enjoined in the *International News Service* case, *supra*. In the second place, turning to the justification, the defendant is either competing or not competing with the complainant. If the defendant is competing, this furnishes a *prima facie* justification; but the justification is defeated because the defendant's activities in pirating and disseminating news constitute an unfairness of the same nature as that involved in the *International News Service* case. If the defendant is not competing, then the unfairness remains, but without even the colorable justification of a competitive interest.

D. The Defendant's Interference With Complainant's Business is not Justified by Any Public Interest.

Petitioner devotes considerable space to the matter of the public interest in the wide and rapid dissemination of news. As the Circuit Court of Appeals said in this connection (R. p. 562):

> "In its final analysis this argument of KVOS to sustain the dismissal rests on the proposition that the bill in International News Service v. Associated Press, supra, would have been dismissed by the Supreme Court if the

> International News Service's members then had had a much faster distribution of the pirated news and had relied entirely on advertising income from their papers."

There is no point in the discussion of this public interest unless it is assumed that respondent has some right which would be protected but for the alleged public interest. More specifically the issue comes down to this. Petitioner is obliged to concede that The Associated Press (and its members) are entitled, under the *International News Service* case, to the protection of their business of disseminating their gathered news as against a news agency which, acting as a middleman, distributes news pirated from the respondent to the direct disseminators of news; but petitioner contends that the public interest prevents the extension of this doctrine to the protection of the business against a direct disseminator himself (and it may be remarked that the petitioner claims to be, in part, a news gathering agency, as found by the District Court, R. p. 511).

The Circuit Court of Appeals in its opinion (R. p. 571) says:

> "So far as concerns the case against piracy presented by the bill, the speed of the radio's distribution of news makes the injury done the press in the performance of its business and civic activities the more effective and certain."

Public interest might be better served by competition in the independent gathering of news than by the pilfering by one news gatherer from another. If the public interest requires that Associated Press news be rendered available to radio stations for the purpose of more rapid dissemination, it would be necessary to enact legislation, and, if such legislation were constitutional in other respects, it would still be unconstitutional if it deprived a news agency of its news or its rights therein without providing for due process and just compensation.

Petitioner discusses at some length the "German" case in which a newspaper, obtaining news of the Graf Zeppelin from the radio station's broadcast, thereafter published the news in a special issue of its paper and the Court refused to grant an injunction against such use of broadcast news (Petition pp. 12, 33-40, 50). That case is not controlling here because the dissemination of the news by the radio station which was the owner of the news had been completed when the newspaper had "lifted and published" the news, and hence it might well be argued that there was no encroachment upon the radio station's dissemination of the news. The German Court also based its reasoning in part upon the fact that news as such was not copyrightable in Germany; and recognized no distinction between the law of copyright and the law of unfair competition such as this Court definitely recognized in the *International News Service* case. Thus, the German Court would apparently have decided against The Associated Press in the *International News Service* situation on the ground that the Press, having no copyright, could have no other protection. It may further be remarked that the German law is apparently contrary to the law established in the *Shanley* and similar cases above cited. Thus, the Landgericht at Dantzig (2 Archiv. Fuer Funkrecht, 1929, p. 572, as translated in 1 Journal of Radio Law, April 1931, p. 146) held that the rendition of a copyrighted musical composition on a loud speaker in a restaurant did not constitute a performance for profit within the meaning of the German copyright statute.

In this connection, it may be noted that petitioner urges (Brief, pp. 13, 52) that the Courts should not grant relief because Congress refused to legislate upon this matter in 1884, and suggests that legislation is needed before the Court can grant the requested relief. Perhaps one reason against legislative protection is that equity can afford the necessary protection—and more flexibly according to the circumstances, and it may be added that the argument based on the bill before Congress in 1884 was unsuccessfully urged on this court in the *International News Service* case, 248 U. S. 215, 264, 265.

POINT IV.

The preliminary injunction was rightfully granted.

It is not altogether clear that petitioner even intends to bring the question of the preliminary injunction before this Court. Petitioner's statement of the scope of its argument (Brief, p. 29) seems to indicate that it does not. However, the brief and petition are full of references to matters not open to consideration on the motion to dismiss the bill, and perhaps we must therefore draw the inference that the petitioner means to attack the preliminary injunction should the bill of complaint be upheld.

The motion for a preliminary injunction was submitted on affidavits. Those in behalf of The Associated Press described one hundred and eighty-two piratings by defendant petitioner in which appear one hundred and fifty-three articles containing four hundred and twenty-five identical paragraphs pirated by KVOS (R. pp. 73-465). Besides this there were twenty-seven broadcasts similar to the news items from which they were alleged to be rewritten.

The District Court held (R. p. 480) the showing as to "piracy" was clear and convincing (See Findings, R. p. 511). The Circuit Court of Appeals said (R. p. 575-579) that the record showed continued pirating. Since defendant petitioner refused to desist from its practice after repeated requests (R. pp. 15, 28-30), the preliminary injunction was proper.

The Circuit Court of Appeals in its opinion (R. pp. 579, 580) compares the record here with that in the *International News* case on the preliminary injunction, saying

> "the preliminary injunction there granted was ordered sustained by the Supreme Court on a showing much less comprehensive and detailed than in the record here. Less than thirty instances of piracy are there described as compared with over five times that number here."

It appears, as pointed out by that Court (R. p. 577), that the piracies continued up to the time of the institution of this action. And as said in the opinion of the Circuit Court of Appeals (R. pp. 579, 580)

> "It appears, and it is not denied, that complainant's income from its distribution of its news to the papers serving KVOS' radio area is $6,000 per month, or $72,000 per annum. Since the thirty cases of piracy were sufficient to show a threatened damage warranting a preliminary injunction in the International case the one hundred fifty-three are sufficient here. The Supreme Court there, without evidence of the loss of a subscriber, took notice that such a practice threatened harm to the circulation of the association's member papers requiring injunctive relief. We take similar notice here that such pirating may well affect both their subscriber and advertising income."

In an attempt to show that the occasion for an injunction is trivial, the petition asserts that its station has "at the most" a range limited within "a five-mile radius" (Petition, p. 1). There is no foundation in the record for this amazing statement. Quite to the contrary, petitioner's own affiant, L. H. Darwin, states under oath that the petitioner's "Newspaper of the Air" (R. p. 66)

> "* * * * reaches a greater audience than any newspaper could do so, in that the people on farms in the Counties of Whatcom, Skagit, San Juan, Snohomish and Island depend almost exclusively upon this informative news service for information on news and political events * * *"

It will be seen, from any standard atlas, that the nearest point in Snohomish County is more than thirty miles from Bellingham, while the furthest point is more than ninety miles away.

CONCLUSION.

Respondent submits that the decision of the Circuit Court of Appeals was correct and in accord with the weight of authority, and that the decree below should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 28.—October Term, 1936.

KVOS, Inc., Petitioner, *vs.* The Associated Press. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[December 14, 1936.]

Mr. Justice Roberts delivered the opinion of the Court.

This suit was brought to enjoin petitioner, the proprietor of a radio station at Bellingham, Washington, from appropriating, using, or disseminating news gathered by the respondent or its members during the period such news has commercial value to respondent and its members. The prayers were for temporary and permanent relief. The district court directed the petitioner to show cause why an injunction should not be granted and entered a temporary restraining order.

In summary, the allegations of the bill follow.

Respondent is a New York corporation and petitioner a Washington corporation; "the damage to which complainant is being subjected . . . is in excess of the sum of Three Thousand ($3000.00) Dollars, exclusive of interest and costs, and the amount involved herein and in controversy herein is in excess of said sum of Three Thousand ($3000.00) Dollars, exclusive of interest and costs."

The respondent, a membership corporation, is composed of proprietors or representatives of newspapers published throughout the United States whose business is the gathering, by its own instrumentalities, and by exchange with members, and other means, news, intelligence, and information from all over the world for the benefit of its members, and distribution of the material so gathered amongst them for newspaper publication, conformably to the by-laws.

The respondent has representatives in every important capital and city in the world and has reciprocal arrangements for interchange of news with many important agencies in foreign countries; has more than twelve hundred members, each owning or repre-

senting a daily newspaper, each supplying respondent, as required by the by-laws, with the news gathered locally by the newspaper he represents; the cost of respondent's transactions, amounting yearly to many millions of dollars, is equitably divided among the members; the association's service to members is of financial and business importance to them, due to its promptness, accuracy, and impartiality; the by-laws require that the news furnished shall remain confidential until publication has been fully accomplished by all members.

The petitioner conducts a radio station at Bellingham, Washington, and, as part of its daily broadcast, sends out, three times a day, morning, noon, and evening, what is styled "The Newspaper of the Air" in which petitioner announces what it claims to be, and what usually is, the leading and most interesting news of the day. The Bellingham Herald, published at Bellingham, is a member of the association and, under the by-laws, the respondent is entitled to be furnished by the Herald with all the news from the territory served by that paper; the Seattle Post Intelligencer and the Seattle Daily Times are published at Seattle, Washington, and are represented by memberships in the association which has the same rights to news gathered by those papers.

The petitioner broadcasts news as part of its business and, by so doing, enhances the profits obtained from advertising broadcasts; the newspapers affiliated with the respondent derive a large portion of their revenues from the sale of advertising space, the value of which depends in great measure upon the freshness and interest of the news furnished by them. The petitioner, in the conduct of its station, has become, and is, a competitor of respondent and its members in the obtaining and early distribution of news, for the purpose of popularizing advertising.

The petitioner has no organization of its own for gathering news, but adopts the practice of "pirating" news gathered by the respondent and its members. This practice consists in procuring copies of the Herald, the Post Intelligencer, and the Daily Times and broadcasting parts, or all, of items therein published, whether gathered by these newspapers or received by them from the respondent, the repetition being sometimes verbatim and sometimes a rearrangement of the wording. The copies of the three newspapers do not reach their subscribers for some time (in some cases as much

as twenty-four hours) after publication; whereas petitioner, promptly obtaining the papers, is able to pirate and broadcast their contents and to anticipate the receipt of the news by the newspapers' subscribers. This practice constitutes unfair competition with the respondent; wrongfully deprives the respondent of the just benefits of its labors and expenditures; similarly injures respondent's members; and prejudices the respondent with its members.

The petitioner, though repeatedly requested to desist from the practice, has refused so to do, although neither the association nor any member has granted permission to make use of the news gathered by them; and the continuance by the petitioner of its practice will increasingly cause irreparable injury and damage to the respondent because the effort and expenditures to gather and obtain news will be rendered largely without reward or value so far as concerns the territory served by petitioner's station.

Prior to the return day of the order to show cause why a temporary injunction should not issue, the petitioner filed a motion to dismiss, assigning the following grounds, amongst others: the bill fails to recite facts entitling the plaintiff to the relief prayed and is without equity; there is a non-joinder of parties plaintiff since the bill discloses that the Bellingham Herald, Seattle Post Intelligencer, and Seattle Daily Times are necessary parties; the court is without jurisdiction because the matter in controversy does not exceed three thousand dollars, exclusive of interest and costs, and an inspection of the allegations of the complaint shows the complainant cannot recover any amount in excess of three thousand dollars or any other amount and the sum named in the ad damnum clause of the complaint is not a true statement of complainant's damages and is not alleged in good faith, the facts being that the amount paid to the complainant for furnishing the Associated Press news in the city of Bellingham, to any of its members, is fixed and determined by the size of the city's population, and is not affected by any other condition and complainant has not lost any amount and never will lose any amount by reason of this controversy, and defendant is not a competitor of complainant in any sense of the word; the Bellingham Herald is the real party in interest and the Associated Press has no interest in the cause.

Affidavits were presented in support of and in opposition to the granting of an injunction, and counsel were heard upon the prayer for preliminary injunction and upon the motion to dismiss. The court found the allegations as to citizenship of the parties were true; found "the amount in controversy herein, by reason of defendant's motion to dismiss, must be construed to be in excess of $3,000.00, exclusive of interest and costs"; found the facts as to the business and conduct of the parties substantially as alleged in the complaint; but found that the petitioner had not interfered with the normal operation of respondent's business or diverted any of respondent's profit.

As conclusions of law the court held that it had jurisdiction of the parties and the subject matter "since defendant's motion to dismiss admits for the purpose of pleading all facts well pleaded in the bill of complaint and particularly the necessary diverse citizenship between complainant and defendant and the allegation that there is involved in the controversy herein more than $3,000.00, exclusive of interest and costs" and that "the complainant is a proper party to prosecute this action on its own behalf and on behalf of its members." Based upon certain of the findings of fact the court concluded the acts of the petitioner did not amount to unfair competition with respondent or any of its members and did not violate their property rights; held, therefore, that the complaint failed to state facts sufficient to constitute a cause of action; vacated the temporary restraining order, refused a preliminary injunction, and granted the petitioner's motion to dismiss with prejudice.[1]

The Circuit Court of Appeals reversed[2] and ordered that a preliminary injunction issue restraining the petitioner from appropriating and broadcasting any of the news gathered by the respondent for the period following publication in respondent's newspapers during which the broadcasting of the pirated news to petitioner's most remote auditors may damage the business of respondent's papers in procuring and maintaining their subscriptions and advertising. On the merits the court thought the case controlled by *International News Service* v. *Associated Press*, 248 U. S. 215. Dealing with the petitioner's insistence that the amount

[1] 9 F. Supp. 279.
[2] 80 F. (2d) 575.

in controversy was not shown to exceed three thousand dollars the court held that the *International News Service* case required the conclusion that the respondent was in competition with the petitioner because the decision in that case indicated that the profit seeking business of the constituent newspapers is an integral part of the corporate purpose of the respondent; and that "The several millions of dollars here alleged to be invested in the Association's business (the bill contains no such allegation) may well be damaged to the extent of $3,000 by the pirating practices described." After referring to the character and scope of the respondent's activities the court states:

"It is obvious that the business of gathering and distributing to members, *before* profitable publication, could conceivably be damaged to the extent of $3,000 by the misappropriation and premature publication of the news material. To hold otherwise would warrant the inference that no corporation could be damaged by a wrongful attack on its business, when that business happened to be run at no profit or at a loss. Also, we are unable to hold irrational the claim that the piracy caused a $3,000 damage to the Association's quasi property right in the news."

Although the decision with respect to the amount in controversy was assigned as error in this court, the parties have in the main directed their arguments to the merits; the respondent insisting that *International News Service* v. *Associated Press* fully sustains the decree below; the petitioner contending this cause may be distinguished from the one there adjudicated, or, if not, that decision should be modified. We have no occasion to consider the soundness of these conflicting contentions, for we hold that in the circumstances the respondent had the burden of showing that the case was within the District Court's jurisdiction, and failed to carry it.

The bill seeks redress for damage to the respondent's business and for damage to the business of some or all of its members. The right for which the suit seeks protection is, therefore, the right to conduct those enterprises free of the alleged unlawful interference by the petitioner. No facts are pleaded which tend to show the value of that right. The complaint contains nothing to the purpose save the general statement that the damage to which the respondent is being subjected is in excess of three thousand dollars and the amount involved is in excess of that sum. Such a formal allegation is sufficient, unless the bill contains others which qualify or detract from

it in such measure that when all are considered together it cannot fairly be said that jurisdiction appears on the face of the complaint, in which case the suit should be dismissed by the court *sua sponte*[3] or upon the defendant's motion.[4] In this case the formal allegation is not reenforced or strengthened by other portions of the complaint; neither is it neutralized or weakened by qualifying or detracting allegations. In effect it stands alone. Therefore the court would not have been bound to dismiss upon a motion based solely on alleged insufficient pleading of the amount in controversy; though it might, of its own motion, have entered upon an inquiry to ascertain whether the cause was one over which it had jurisdiction.[5] But where the allegations as to the amount in controversy are challenged by the defendant in an appropriate manner, the plaintiff must support them by competent proof.[6] The petitioner's motion was an appropriate method of challenging the jurisdictional allegations of the complaint. It did not operate merely as a demurrer, for it did not assume the truth of the bill's averments and assert that in spite of their truth the complaint failed to state a case within the court's jurisdiction. On the contrary the motion traversed the truth of the allegations as to amount in controversy and in support of the denial recited facts dehors the complaint. This could have been done by answer but the time for answer had not arrived when the rule to show cause was issued and petitioner was faced with the possibility of an injunction. The motion required the trial court to inquire as to its jurisdiction before considering the merits of the prayer for preliminary injunction. And in such inquiry complainant had the burden of proof.[7] The only attempt to meet that burden is a reply affidavit filed on behalf of respondent, wherein it is deposed "that the payments made by newspapers for said news sold to them by complainant in the territory served by said radio station is upwards of $8,000 per month, which is being imperilled and jeopardized by the acts of defendant . . . by its unlawful and wrongful appropriation of complainant's news,

[3] *Mansfield, C. & L. M. Ry.* v. *Swan*, 111 U. S. 379, 382, 383; *Bucyrus Co.* v. *McArthur*, 219 Fed. 266.

[4] *Coal Co.* v. *Blatchford*, 11 Wall. 172; *Ladew* v. *Tennessee Copper Co.*, 179 Fed. 265; affirmed 218 U. S. 357.

[5] Act of March 3, 1875, § 5, c. 137, 18 Stat. 470, 472; Jud. Code, § 37, 28 U. S. C. § 80; *McNutt* v. *General Motors &c. Corp.*, 298 U. S. 178, 182, 184.

[6] *McNutt* v. *General Motors &c. Corp.*, *supra*, p. 189.

[7] *McNutt* v. *General Motors &c. Corp.*, *supra*, p. 189.

and said sum greatly exceeds the sum of Three Thousand Dollars, exclusive of interest and costs, and complainant is in danger of losing said memberships and payments if defendant's practices in respect to pirating said news is not enjoined.' This deposition must be read in connection with the statement in the bill that the respondent makes no profit from furnishing news to its members but equitably divides the expense amongst them. The association cannot therefore lose the $8,000 in question. If the three newspapers in the affected territory cease to pay the sum, they will save it, not lose it, and, as to any other damage they may suffer from petitioner's competition, the affiant is silent. Assuming, without deciding, that in the circumstances disclosed the respondent has standing to maintain a suit to redress or prevent damage caused its members by petitioner's conduct, the allegation of possible damage to them is wholly inadequate, because the asserted danger of loss of members is a mere conclusion unsupported by even a suggestion that withdrawal has been threatened by any newspaper, and no intimation is given of the character or extent of the damage they would suffer by such withdrawal. The respondent having failed to support the allegations as to amount in controversy the District Court should have dismissed the bill.

The suggestion is made in the respondent's argument, and in the opinion below, that, as the allegations in the *International News Service* case, *supra*, were substantially like those of the bill now before us, this court must have been of opinion that the District Court had jurisdiction in the *International* case or it would not have considered the merits. But in that case the answer did not challenge the jurisdiction, there was no assignment of error raising the question and no argument on the subject was presented to this court. "The most that can be said is that the point was in the case if anyone had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster* v. *Fall*, 266 U. S. 507, 511.

The Circuit Court of Appeals sustained the District Court's jurisdiction on the ground that the finding upon that point was not without support, and the appellate tribunal could not say it was wrong, in view of the magnitude of the respondent's operations and expenditures. As pointed out in *McNutt* v. *General Motors*

&c. Corporation, supra, at pages 180 and 181, these factors are irrelevant upon the issue of the value of the right for which protection is here sought.

Since the allegation as to amount in controversy was challenged in appropriate manner, and no sufficient evidence was offered in support thereof, the bill should have been dismissed. *McNutt* v. *General Motors &c. Corp., supra,* p. 190. The Circuit Court of Appeals had jurisdiction of the appeal and as the District Court lacked jurisdiction its decree dismissing the bill should have been affirmed on that ground.

The decree of the Circuit Court of Appeals is reversed and the cause is remanded to the District Court with directions to dismiss the bill of complaint for want of jurisdiction.

A true copy.

Test:

Clerk, Supreme Court, U. S.